Supreme Court, U.S.
FILED
OCT 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEOFFREY MONGE, AS SHERIFF OF SARASOTA COUNTY, FLORIDA, MAX FRIMBERGER, AS CAPTAIN OF THE SARASOTA COUNTY JAIL, AND THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,
Petitioners,

v.

MICHAEL DENNIS STRAUB,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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Respondent Straub argues that certiorari should be denied because (1) the holding that Straub was indigent while he was incarcerated in the County jail was not clearly erroneous (Opp. 6-8); and (2) the alternative holding—that a *non-indigent* prisoner must be afforded access to a law library or legal representation in a civil action—does not represent an expansion of this Court's holdings on the right of access to the courts. Opp. 9-12. Straub's arguments warrant a brief reply.

1. The single most important point in respondent's submission is his recognition that the Eleventh Circuit

unequivocally held that, regardless of his financial needs, Straub was entitled as a constitutional right to access to a law library to prepare for civil litigation. As Straub plainly states, the Eleventh Circuit "held that the financial status of the detainee has no bearing on the constitutional mandate of meaningful access to the courts . . ." Opp. 8. The holding below thus represents a significant expansion of the obligation, articulated by this Court in *Bounds*, "to provide adequate library facilities for the use of *indigent prisoners* seeking to file *pro se habeas* or *civil rights actions* . . . ." *Bounds* v. *Smith*, 430 U.S. 817 (1977) (emphasis added).

Thus, contrary to respondent's contention (Opp. 10-12), the Eleventh Circuit did not merely follow this Court's holding in *Bounds* in an uncontroversial manner.[1] The right announced in *Bounds* was designed to ensure that *indigent* inmates enjoyed a "*reasonably adequate* opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825. As Judge Hill noted, in his concurring opinion, the decision below "goes far beyond *Bounds*" to "give every prisoner the right to access to a law library for every perceived legal problem, whether or not he can afford legal counsel." App. 17a. The expansion of the right of access recognized in *Bounds* to non-indigent inmates, who can afford private counsel and thus have an adequate opportunity to present their case in court, imposes an unnecessary security risk and substantial financial burden on state and local governments. Pet. 8-10.

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[1] Straub quotes the *Bounds* opinion for the proposition that the state is obligated to ensure that "all prisoners [have] meaningful access to the courts." Opp. 11. Petitioners have never denied that this principle is the motivating rationale of the "right of access." Pet. 9-11. What respondent—and the Eleventh Circuit—fails to recognize or address is that a "non-indigent inmate with access to a lawyer *has* 'reasonably adequate opportunity' to present his case to the court" thereby obviating the need for state-funded assistance. Pet. 9.

Indeed, respondent does not dispute that the holding below imposes substantial costs. Instead, he argues that those costs are constitutionally required. The validity of that claim warrants review by this Court.

2. The petition also warrants review because the decision below conflicts with decisions of other courts of appeals. Petitioners demonstrated that the decision below is in conflict with at least four other circuits which offer more restrictive views of the "right of access" announced in *Bounds*. Pet. 10-13; see *Bee* v. *Utah State Prison*, 823 F.2d 397 (10th Cir. 1987) (*Bounds* only requires assistance to inmates at initial pleading stage). In particular, the Eleventh Circuit's decision plainly conflicts with *Wilson* v. *Zarhadnick*, 534 F.2d 55 (5th Cir. 1976), in which the Fifth Circuit held that the state is under no duty to provide an inmate with legal materials at public expense if the inmate can afford counsel. In response, Straub simply states that *Wilson* is of "limited precedential significance." Opp. 13. Respondent's assessment stands in stark contrast to the analysis of Judge Hill, who criticized the court below for "flatly overrul[ing] *Wilson*. . . ." Pet. App. 9a. That conflict warrants review by this Court.

3. Respondent's primary argument is that the finding of the district court that respondent was indigent renders the broader issue concerning respondent's right of access to legal materials unworthy of further review by this Court. There are two answers to this contention: First, the fact that a decision by this Court would not necessarily finally resolve this case in petitioner's favor, should not deter the Court from resolving the important question actually decided by the court of appeals. *Cf. United States* v. *Kozminski*, No. 86-2000 (cert. granted Oct. 13, 1987). A major expansion of a constitutional right which imposes significant burdens on governmental entities should not be insulated from review by this Court by labelling the decision as "dicta" or by attempting to

minimize its importance through a clearly erroneous alternative holding. Pet. 14.

Second, there can be no dispute that, contrary to Straub's affidavit of insolvency which he relies upon here, Straub clearly was not indigent while he was incarcerated in the County jail. In fact, Straub admitted making a "false statement" when, in his application to receive free legal services, he claimed he had no income. Straub Tr. at 92. Straub repeatedly testified that, at the time of his incarceration, he was receiving approximately $1200 a month from the Veterans Administration. Straub Tr. 33, 90, 127. Straub admitted that he was receiving additional educational benefits from the VA of $422—$511 per month. Straub Tr. 51-52. The extent of Straub's savings was in dispute, but the record includes a bank statement showing that Straub had $1375 in savings at the time of his arrest. Straub Tr. 84.[2]

Rather than addressing these issues directly, Straub attempts to obscure them by arguing that "Petitioner's representation" of other issues "is incorrect and inconsistent with the evidence at trial." Opp. 7. But, it is Straub whose characterization of the record is misleading. For example, Straub states that he "did not pur-

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[2] Despite Straub's contention that "the record is replete with evidence" of his indigency (Opp. 10), close examination of the record reveals that respondent is flatly contradicted in virtually every one of his assertions. For example, Straub states that "any money or income he was receiving went to his wife and children." Opp. 10. In fact, Straub testified that he had voluntarily "agreed" to pay his wife $500—$850 a month, substantially less than his income of $1,200 per month. Straub Tr. 93-94. He also misleadingly states that he made "several attempts to employ counsel" (Opp. 10), but those attempts related to efforts to employ counsel in his criminal matter—not in the civil action at issue here. Straub Tr. 110-111. In fact, his efforts to retain counsel in the civil forfeiture proceeding consisted of one letter requesting free legal services. Straub Tr. 22, 116.

chase his former wife an automobile while incarcerated in the Sarasota County Jail." Opp. 7. In fact, Straub did not "purchase" the car, but he authorized having the car payments made, out of his savings account, during the time period in question.[3] Similarly, Straub states that for "three months" he made "unsuccessful attempts to obtain assistance of the Public Defender." Opp. 5. In fact, the public defender met with Straub and entered an appearance on his behalf the day after his arrest. Straub Tr. 103.

While Straub is clearly correct (Opp. 9-10) that review of factual issues is typically not the province of this Court, such review is warranted where, as here, review of an important constitutional issue depends upon the proper resolution of a factual dispute. It is the court below and respondent who attempt to shield a critical issue of law from this Court's scrutiny. Before acquiescing in that effort, the Court should be convinced that there is a basis in the record for respondent's assertion. But even a generous reading of the record demonstrates no support for Straub's characterization in his brief in

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[3] The record (Straub Tr. 98) reflects the following colloquy:

> Q: Isn't it true that your mother testified . . . that she was authorized by you to purchase a new car for your wife for 2200 and some dollars.
>
> A: (by Straub): That's not true.
>
> Q: Did you authorize your mother to make any payments to your wife in the amount of . . . approximately $2200?
>
> A: $2100, yes, I did.
>
> Q: Okay. Was that for the purchase of a car?
>
> A: Of a car, yes.
>
> Q: What you're disputing is that it was new. It was a used car?
>
> A: Obviously, yes.

Any present uncertainty regarding Straub's financial status plainly can be attributed to respondent's lack of candor, and according to the district court (App. 24a), lack of credibility, regarding his income and expenditures.

this Court of his financial status while in jail.[4] And, what is even more important, Straub makes no attempt to dispute the *essential* fact that he did not meet the standards of indigency set forth in the Florida Statutes. Pet. 2-4, n. 5. The holding by the court below on this issue clearly was erroneous and should be no bar to reviewing the important alternative holding of the court of appeals concerning a non-indigent inmate's right of access to a law library.

* * * *

Respondent does not dispute that the Eleventh Circuit has now held that *all* inmates—regardless of wealth or adequacy of representation—are entitled to access to law libraries in order to pursue civil litigation. That decision imposes significant financial burdens upon state and local governments in Florida, Georgia and Alabama. Because the decision below represents a significant expansion of the right of access established by this Court and because of the importance of this issue to state and local governments and their taxpayers, this Court should grant the petition to resolve the issue whether non-indigent inmates are entitled to insist upon state-sponsored assistance in achieving access to the courts in civil proceedings.

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[4] Straub states that "Petitioners did not permit [him] to receive any copies of cases and statutes" that were brought to him by his family. Opp. 6. However, both Straub and his public defender testified that Straub received mimeographed copies of cases and other legal research materials from his public defender while incarcerated. I Tr. 98-100; Straub Tr. 111-112.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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